Kinta Riverfront Hotel & Suites Sdn Bhd v Chang Yoke Yee & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A-02(NCVC)(W)-1771–11 OF 2020
KAMALUDIN MD SAID, AZIZAH NAWAWI AND RAVINTHRAN JJCA
22 NOVEMBER 2022

Tort — Defamation — Absolute privilege — Whether defamatory statements made in course of court proceedings were protected by absolute privilege even if made irrelevantly, recklessly or maliciously — Whether once it was accepted that absolute privilege defence applied it could not be restricted by imposition of conditions such as relevancy or good faith

In December 2016, the first and second respondents — who were, respectively, a businesswoman and a lawyer — were in a room at the appellant's hotel when a man named Voon Chee Wai ('Voon') obtained an access card from the hotel's reception staff and barged into the respondents' room and assaulted them. Following the incident, the respondents succeeded in their suit against the appellant and Voon for, respectively, the torts of negligence and assault. In its statement of defence in that suit, the appellant had, inter alia, stated that: (a) the reason its hotel staff gave the access card to Voon was because they believed he was the first respondent's husband; and (b) the quarrel and assault that took place in the room was because the respondents were committing adultery at the time. The adultery allegation caused the respondents to sue the appellant for defamation. Initially, the High Court allowed the appellant's application to strike out the defamation suit on the ground that the allegations in the statement of defence were protected by absolute privilege. The Court of Appeal, however, reversed the decision and ordered that the question of whether the appellant was protected by absolute privilege be determined in a full trial. At the ensuing trial, the respondents, who denied that they had committed adultery, were the only witnesses who testified. The appellant relied upon the defences of absolute privilege, justification and fair comment and did not call any witnesses and submitted 'no case to answer' when the respondents closed their case. The trial judge found the defence of justification and fair comment unproven. As for the defence of absolute privilege, the trial judge held that the defence could only apply if the defamatory remarks were relevant to the issue at hand and were made in good faith. The judge held that the defence did not apply in the instant case because the impugned remarks were made maliciously and in bad faith and were not relevant to the proceedings. In coming to his decision, the trial judge relied upon Haidar JCA's judgment in *Mahadevi Nadchatiram v Thiruchelvasegaram Manickavasegar* [2001] MLJU

769; [2001] 3 CLJ 65 ('Mahadevi Nadchathiram') and the dissenting judgment of Hamid Sultan JCA in *Kalung Makmur Sdn Bhd v Lo Yen Nyuk* [2018] 2 MLJ 428 ('Kalung Makmur').

Held, unanimously allowing the appeal and setting aside the High Court's decision:

(1) The defamation in the instant case was published within the four corners of a court proceeding. Although the impugned averments were irrelevant, reckless and perhaps malicious, based on the eminent authorities on the point, the defence of absolute privilege availed the appellant. The trial judge erred in deciding otherwise (see para 34).

(2) The principle that pleadings and documents filed in court proceedings were protected by absolute privilege had been consistently accepted and applied by our courts. Once it was accepted that absolute privilege applied to an averment in a pleading, there could be no question of limiting that defence by placing restrictions on it such as the requirement of relevance and good faith. Otherwise, only the defence of qualified privilege would apply to defamatory statements made in the course of court proceedings (see para 31).

(3) The trial judge seriously misdirected himself by relying on a passage in the judgment of Haidar JCA in *Mahadevi Nadchatiram* to deprive the appellant of the defence of absolute privilege on the ground that the defamatory statements in the statement of defence were not relevant and were not made in good faith (see paras 27–28).

(4) In *Mahadevi Nadchatiram*, Haidar JCA did not restrict the defence of absolute privilege but found that the defamatory statements made in the submissions filed in the course of the court proceedings were protected by absolute privilege. The passage in Haidar JCA's judgment that was relied upon by the trial judge was not applicable to the facts of the instant case as Haidar JCA was referring to a hypothetical situation in which a defamatory statement was made against someone 'who had absolutely no connection' with the court proceedings in question. In our case, the parties against whom the defamatory statements were made were obviously parties who were connected to the negligence suit (see paras 29–30).

(5) The trial judge also misdirected himself by relying upon the dissenting judgment of Hamid Sultan JCA in *Kalung Makmur* to place restrictions on the defence of absolute privilege. The remarks that were made in that case were in relation to defamation in a police report and did not concern a defamatory pleading in court proceedings. In any event, the majority of the Court of Appeal in that case correctly held that police reports were also protected by absolute privilege (see para 33).

(6) At the trial, the first respondent denied that she was married to Voon whilst the second respondent said he was a married man. The only fact conceded by the respondents was that they were together in the hotel room at the material time. They categorically denied that they had committed adultery. That evidence was not seriously challenged by the appellant's counsel. The appellant did not call any witnesses of its own. The burden to prove the defence of justification was on the appellant. In the premises, the trial judge did not err in finding that the defence of justification had failed. Similarly, the defence of fair comment, although not dealt with by the trial judge, also could not stand as the foundational fact of adultery was not proven. Therefore, no fair comment could be validly made upon it (see para 18).

[Bahasa Malaysia summary

Pada Disember 2016, responden pertama dan kedua — yang masing-masing merupakan ahli perniagaan dan peguam — berada di dalam bilik di hotel perayu apabila seorang lelaki bernama Voon Chee Wai ('Voon') memperoleh kad akses daripada kakitangan penerimaan tetamu hotel dan menyerbu masuk ke dalam bilik responden dan menyerang mereka. Berikutan kejadian tersebut, responden berjaya dalam saman mereka terhadap perayu dan Voon, masing-masing, atas tort kecuaian dan serangan. Dalam pernyataan pembelaannya dalam saman tersebut, perayu telah, antara lain, menyatakan bahawa: (a) alasan kakitangan hotelnya memberikan kad akses kepada Voon adalah kerana mereka percaya beliau adalah suami responden pertama; dan (b) pertengkaran dan serangan yang berlaku di dalam bilik adalah kerana responden melakukan zina pada masa tersebut. Dakwaan zina menyebabkan responden menyaman perayu atas tuduhan memfitnah. Pada mulanya, Mahkamah Tinggi membenarkan permohonan perayu untuk membatalkan saman fitnah atas alasan bahawa dakwaan dalam pernyataan pembelaan dilindungi oleh keistimewaan mutlak. Mahkamah Rayuan bagaimanapun, mengakas keputusan tersebut dan memerintahkan supaya persoalan sama ada perayu dilindungi oleh keistimewaan mutlak ditentukan dalam perbicaraan penuh. Pada perbicaraan berikutnya, responden, yang menafikan mereka berzina, adalah satu-satunya saksi yang memberikan keterangan. Perayu bergantung kepada pembelaan keistimewaan mutlak, justifikasi dan komen berpatutan dan tidak memanggil mana-mana saksi dan mengemukakan 'tiada kes untuk dijawab' apabila responden menutup kes mereka. Hakim perbicaraan mendapati pembelaan justifikasi dan komen berpatutan tidak dibuktikan. Bagi pembelaan keistimewaan mutlak, hakim perbicaraan memutuskan bahawa pembelaan hanya boleh digunapakai sekiranya kenyataan fitnah tersebut berkaitan dengan isu yang dihadapi dan dibuat dengan suci hati. Hakim memutuskan bahawa pembelaan tersebut tidak terpakai dalam kes semasa kerana kenyataan yang dipersoal tersebut dibuat secara curang dan berniat jahat serta tidak relevan dengan prosiding. Dalam membuat keputusan, hakim perbicaraan bergantung kepada penghakiman

A Haidar HMR dalam *Mahadevi Nadchatiram v Thiruchelvasegaram Manickavasegar* [2001] MLJU 769; [2001] 3 CLJ 65 ('Mahadevi Nadchathiram) dan keputusan oleh Hamid Sultan HMR dalam *Kalung Makmur Sdn Bhd v Lo Yen Nyuk* [2018] 2 MLJ 428 ('Kalung Makmur').

B **Diputuskan**, sebulat suara membenarkan rayuan dan mengetepikan keputusan Mahkamah Tinggi:

(1) Fitnah dalam kes semasa disiarkan dalam empat penjuru prosiding mahkamah. Walaupun kenyataan yang dipersoal adalah tidak relevan, melulu dan mungkin berniat jahat, berdasarkan otoriti sedia ada C mengenai perkara tersebut, pembelaan keistimewaan mutlak mengatasi perayu. Hakim bicara terkhilaf dalam memutuskan sebaliknya (lihat perenggan 34).

D (2) Prinsip bahawa pliding dan dokumen yang difailkan dalam prosiding mahkamah dilindungi oleh keistimewaan mutlak telah diterima secara konsisten dan digunakan oleh mahkamah kami. Sebaik sahaja ia diterima bahawa keistimewaan mutlak dikenakan ke atas kenyataan dalam pliding, tidak ada persoalan untuk mengehadkan pembelaan tersebut E dengan meletakkan sekatan ke atasnya seperti keperluan yang relevan dan niat baik. Jika tidak, hanya pembelaan keistimewaan mutlak akan terpakai kepada kenyataan fitnah yang dibuat semasa prosiding mahkamah (lihat perenggan 31).

F (3) Hakim bicara telah salah arah secara serius dirinya sendiri dengan bergantung kepada petikan dalam penghakiman Haidar HMR di *Mahadevi Nadchatiram* untuk menyekat perayu terhadap pembelaan keistimewaan mutlak atas alasan bahawa kenyataan fitnah dalam pernyataan pembelaan tidak relevan dan adalah tidak dibuat dengan niat baik (lihat perenggan 27–28).

G (4) Dalam *Mahadevi Nadchatiram*, Haidar HMR tidak menyekat pembelaan keistimewaan mutlak tetapi mendapati bahawa kenyataan fitnah yang dibuat dalam penghujahan yang difailkan semasa prosiding mahkamah dilindungi oleh keistimewaan mutlak. Petikan dalam H penghakiman Haidar HMR yang disandarkan oleh hakim bicara tidak terpakai kepada fakta kes semasa kerana Haidar HMR merujuk kepada situasi hipotesis di mana kenyataan fitnah dibuat terhadap seseorang 'yang sama sekali tidak mempunyai kaitan' dengan prosiding mahkamah berkenaan. Dalam kes kami, pihak yang kenyataan fitnah dibuat I terhadapnya jelas sekali adalah pihak yang berkaitan dengan saman kecuaian (lihat perenggan 29–30).

(5) Hakim perbicaraan juga salah arah dirinya dengan bergantung kepada penghakiman berbeza Hamid Sultan HMR di *Kalung Makmur* untuk meletakkan sekatan ke atas pembelaan hak keistimewa mutlak.

Kenyataan yang dibuat dalam kes tersebut adalah berkaitan dengan fitnah dalam laporan polis dan tidak melibatkan pengakuan berunsur fitnah dalam prosiding mahkamah. Walau apa pun, majoriti Mahkamah Rayuan dalam kes tersebut dengan betul berpendapat bahawa laporan polis juga dilindungi oleh keistimewaan mutlak (lihat perenggan 33).

(6) Pada perbicaraan, responden pertama menafikan bahawa beliau telah berkahwin dengan Voon manakala responden kedua mengatakan beliau seorang lelaki yang sudah berkahwin. Satu-satunya fakta yang diakui oleh responden adalah mereka berada bersama-sama di bilik hotel pada masa material. Mereka secara bersama menafikan bahawa mereka telah melakukan zina. Keterangan tersebut tidak dicabar secara serius oleh peguam perayu. Perayu tidak memanggil mana-mana saksi sendiri. Beban untuk membuktikan pembelaan justifikasi terletak pada perayu. Di dalam premis tersebut, hakim bicara tidak terkhilaf apabila mendapati pembelaan justifikasi telah gagal. Begitu juga, pembelaan komen berpatutan, walaupun tidak diputuskan oleh hakim bicara, juga tidak dapat dipertahankan kerana fakta asas zina tidak dibuktikan. Oleh itu, tiada komen berpatutan boleh dibuat secara sah ke atasnya (lihat perenggan 18).]

Cases referred to

Dato' Dr Low Bin Tick v Datuk Chong Tho Chin and other appeals [2017] 5 MLJ 413; [2017] 8 CLJ 369, FC (refd)

Hock Peng Realty Sdn Bhd v Ting Sie Chung @ Ting Sieh Chung and another appeal [2018] 2 MLJ 51; [2018] 1 CLJ 776, CA (refd)

Kalung Makmur Sdn Bhd v Lo Yen Nyuk [2018] 2 MLJ 428; [2018] 1 CLJ 459, CA (refd)

Lee Yoke Yam v Chin Keat Seng [2013] 1 MLJ 145; [2012] 9 CLJ 833, FC (refd)

Lincoln v Daniels [1961] 3 All ER 740, CA (refd)

Mahadevi Nadchatiram v Thiruchelvasegaram Manickavasegar [2001] MLJU 769; [2001] 3 CLJ 65, CA (refd)

Munster v Lamb (1883) 11 QBD 588, CA (refd)

Royal Aquarium and Summer and Winter Garden Society, Limited v Parkinson [1892] 1 QB 431, CA (refd)

S Ashok Kandiah & Anor v Dato' Yalumallai @ Ramalingam s/o Muthusamy & Anor [2010] MLJU 2218; [2011] 1 CLJ 460, CA (refd)

Westcott v Westcott [2008] EWCA Civ 818, CA (distd)

Legislation referred to

Defamation Act 1957 s 11

Appeal from: *Chang Yoke Yee & Anor v Kinta Riverfront Hotel & Suites Sdn Bhd & Anor* [2021] MLJU 2999 (High Court, Ipoh)

Rabinder Singh (with Munira bt Hasnim) (KS Su & Mah) for the appellant.
Raam Kumar (with Norleena Jamal) (Tan Kumar & Partners) for the respondent.

Ravinthran JCA:

INTRODUCTION

[1] The appellant who was the first defendant in the High Court was found liable for defaming the respondents. The second defendant did not defend the action and judgment in default was entered against him. The alleged defamatory statement was published in a statement of defence filed by the appellant in another suit; a negligence suit brought by the respondents. The main issue in the court below and before us is whether the appellant can avail the defence of absolute privilege as the defamation was published in the course of court proceedings in the statement of defence.

BACKGROUND FACTS

[2] The first respondent is a businesswoman. The second respondent is a senior lawyer. The appellant runs a hotel in Ipoh. The second defendant is an individual who apparently claimed to be the husband of the first respondent. This fact was disputed by the first respondent. The detailed factual background need not detain us long as it is apparent that the big question that arises in this appeal is a question of law about the defence of absolute privilege. It suffices if we summarise what happened in the hotel that involved the respondents and the second defendant.

[3] On 17 December 2016, the respondents were in a room in the hotel in question that was managed by the appellant. The second respondent obtained an access card from the reception staff and barged into the hotel room occupied by the respondents. He assaulted both respondents. Following this incident, the respondents filed a civil suit (Suit AA-22ANCVC-301 of 2017) against both the appellant and the second defendant in the High Court. The cause of action pleaded against the appellant was the tort of negligence as the hotel staff had given the room access card to the second defendant. The tort of assault was pleaded against the second defendant. The suit was transferred to the sessions court. The respondents succeeded in their action against the appellant and the second defendant in the sessions court. After that, the respondents instituted the instant defamation action in the High Court.

DEFAMATION ACTION

[4] It is the respondents' case the adultery allegations in the statement of defence filed in the negligence action by the appellant were defamatory. In the statement of defence, the appellant pleaded that the respondents committed

adultery and that was the cause of the altercation between them and the second defendant. The respondents filed an application to strike out all the averments relating to the adultery allegation on the ground that they frivolous, vexatious, scandalous and malicious. The sessions court allowed the application and the appellant did not appeal the decision.

[5] However, the matter of the defamatory averments in the statement of defence did not end after they were struck out. The respondents issued a notice of demand on 27 December 2017 to the appellant and the second defendant demanding retraction and unconditional apology in the newspapers for the defamatory pleadings. Upon failure of the appellant and the second defendant to accede to the notice of demand, the respondents filed the instant defamation suit against them.

DEFAMATORY AVERMENTS

[6] The respondents pleaded that the following averments in the original statement of defence filed by appellant was defamatory of them. The averments pertain to the allegation that they committed adultery in the hotel room in question. The averments are as follows:

> Paragraph 5:
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> Defendan Pertama menegaskan bahawa kebanyakan kakitangan Defendan Pertama mengenali Plaintif Pertama dan Defendan Kedua sebagai suami isteri seperti mana yang diketahui umum.
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> Paragraph 8:
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> Defendan Pertama menegaskan bahawa Plaintif Kedua adalah seorang individu yang mempunyai isteri dan anak-anaknya melalui perkahwinan yang sah, dan Defendan Pertama dan kakitangannya pula hanya mengenali Plaintif Pertama dan Defendan Kedua sebagai suami isteri, pada segala masa yang material. Defendan Pertama memohon Plaintif Kedua untuk mengemukakan butiran berkenaan perkahwinannya yang sah dan anak-anaknya, semasa perbicaraan tindakan ini untuk membuktikan kepada Mahkamah, berkenaan sebab pertelingkahan dan pergaduhan berlaku di antara Plaintif Kedua dan Defendan Kedua. Defendan Pertama menegaskan bahawa pertelingkahan di antara Plaintif-Plaintif dan Defendan Kedua berlaku akibat hubungan sulit dan zina ('adultery') di antara Plaintif-Plaintif dan dengan itu pergaduhan yang berlaku adalah berada di luar kawalan Defendan Pertama.
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> Paragraph 9:
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> Defendan Pertama menegaskan bahawa ianya adalah tindakan Plaintif Ke 2 yang sanggup menetap di dalam bilik yang sama dengan isteri Defendan Ke 2 yang mencetuskan pergaduhan dan pertelingkahan di dalam kes ini. Defendan Pertama tidak mempunyai apa-apa pengetahuan berkenaan hubungan sulit dan zina ('adultery') di antara Plaintif-Plaintif ...
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> Paragraph 10:

Defendan Pertama menyatakan bahawa Penyambut Tetamu Defendan Pertama telah memberikan kad akses kepada Defendan Ke 2 dengan anggapan bahawa Defendan Ke 2 ingin berjumpa isterinya yang menetap di bilik no. 1809, pada hari tersebut dan Penyambut Tetamu Defendan Pertama tidak mempunyai pengetahuan berkenaan hubungan sulit di antara Plaintif-Plaintif. Defendan Pertama tiada apa-apa niat lain selain membantu Defendan Ke 2 untuk pergi berjumpa dengan isterinya, yang dikenali oleh Penyambut Tetamu.

Paragraph 11:

Defendan Pertama menegaskan bahawa Defendan Pertama tidak pernah berdepan dengan kes melibatkan hubungan sulit yang ditangkap, sepertimana kes ini.

Paragraph 12:

Defendan Ke 2 telah amat marah dengan tindakan Plaintif Pertama yang didapati menjalin hubungan sulit dengan Plaintif Ke 2 yang juga adalah seorang yang telah berumahtangga. Defendan Pertama percaya bahawa Defendan Ke 2 akan mengemukakan Pembelaan yang sewajarnya berkenaan hubungannya dengan Plaintif Pertama ...

[7] The respondents prayed for the following reliefs from the appellant and the second defendant:

(a) general damages;

(b) exemplary and aggravated damages;

(c) irrevocable apologies and withdrawal of all allegations by the defendants; and

(d) undertaking in writing not publish or caused to be published false allegations against the plaintiffs in the future:

(i) compensation to be paid to the plaintiffs;

(ii) legal costs based on the solicitor-client basis; and

(iii) any other reliefs that this honourable court deems just and fair

[8] As we noted earlier, the second defendant did not enter appearance and judgment in default was entered against him on 10 February 2020. The appellant filed an application to strike out the suit on the ground that the impugned defamatory averments in the statement of defence were protected by absolute privilege. The High Court allowed the striking out application of the appellant but upon appeal, the Court of Appeal reversed the decision. The Court of Appeal was of the view that the issue whether the instant appellant was entitled to the defence of absolute privilege should be decided by the learned trial judge after a full trial.

TRIAL BEFORE THE HIGH COURT

[9] The only witness for the respondents were themselves. The respondents' case was that the impugned averments that had been struck out contained the following imputations:

(a) the plaintiffs had committed adultery;

(b) the plaintiffs had an affair and was caught committing adultery;

(c) the first plaintiff as the wife of the second defendant had an extra-marital affair with the second plaintiff;

(d) the plaintiffs were adulterers;

(e) the plaintiffs had committed adultery and cheated on their respective spouses;

(f) the plaintiffs' characters were bereft of honesty and integrity;

(g) the plaintiffs' lacked self-respect and have no morals; and

(h) the plaintiffs were people of unworthy and uncreditable reputation and were untrustworthy.

[10] The appellant raised the defence of absolute privilege and justification and fair comment. However, at the end of the plaintiff's case, the appellant submitted a no case to answer and did not call any witness.

DECISION OF HIGH COURT

[11] The appellant did not give any evidence in this case as they elected to submit a no case to answer. The respondents denied committing adultery. In the premises, the learned High Court judge found that the defence of justification and fair comment failed.

[12] The learned High Court judge dealt at length with the defence of absolute justification. His Lordship firstly noted that the provision of the defence of absolute privilege in the Defamation Act 1957 (Revised 1983) in s 11 pertains to reports of judicial proceedings. In respect of a defamatory statement made in the course of a court proceeding, either by a litigant, counsel or witness, the learned High Court judge said the defence of absolute privilege is afforded by the common law as applied in our jurisdiction. He cited the local cases of *Hock Peng Realty Sdn Bhd v Ting Sie Chung @ Ting Sieh Chung and another appeal* [2018] 2 MLJ 51; [2018] 1 CLJ 776, *Dato' Dr Low Bin Tick v Datuk Chong Tho Chin and other appeals* [2017] 5 MLJ 413; [2017] 8 CLJ 369 and *Mahadevi Nadchatiram v Thiruchelvasegaram Manickavasegar* [2001] MLJU 769; [2001] 3 CLJ 65. In all those cases, the landmark English

authorities on the defence of absolute privilege were discussed. The said English cases are *Royal Aquarium and Summer and Winter Garden Society, Limited v Parkinson* [1892] 1 QB 431 (CA), *Lincoln v Daniels* [1961] 3 All ER 740 (CA) and *Munster v Lamb* (1883) 11 QBD 588.

[13] However, the learned High Court judge was of the view that the defence of absolute privilege is not without restrictions. His Lordship said as follows in the following paragraphs of his judgment:

> [68] I fully agree with and equally bond by the position taken by the Court of Appeal above. In my mind, the requirement of relevance and good faith as a proviso to the defence of absolute privilege specifically in judicial proceedings is of utmost importance. This is to avoid possible instances where a party may be improperly and maliciously harassed with irrelevant, scandalous, malicious, libellous or slanderous defamatory statements guised in the blanket form of a statement made in the course judicial proceeding by the other party.
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> ...
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> [70] In the present case, I agree with the learned counsel for the plaintiffs that the impugned statements in the statement of defence which impute that the plaintiffs had committed adultery, cohabitation and were involved in extra-marital affairs are of no particular relevance to the initial suit which was based on the tort of negligence, assault and breach of privacy ...

[14] Two authorities were cited by the learned High Court judge for this view. The first authority is the judgment of this court in *Mahadevi Nadchatiram v Thiruchelvasegaram Manickavasegar*. In that case, the major English cases on the defence of absolute privilege in respect of statements made in the course of court proceedings were cited with approval. Nonetheless, there is a passage in the said judgment where Haidar JCA said that a defamatory statement of person who has absolutely no connection with the court proceedings in question cannot be protected by the defence of absolute privilege.

[15] The second authority cited by the learned High Court judge is the dissenting judgment of Hamid Sultan JCA in the case of *Kalung Makmur Sdn Bhd v Lo Yen Nyuk* [2018] 2 MLJ 428; [2018] 1 CLJ 459. That case concerned a defamatory statement in a police report. Hamid Sultan JCA in his dissenting judgment express doubt if a malicious complainant can be granted absolute immunity. On the other hand, the majority judges held that malice is not relevant and that statements in a police report are protected by absolute privilege.

[16] In the instant case, having found that the defamatory averments in the statement of defence were maliciously made and in bad faith, the learned High Court judge held that they are not protected by absolute privilege and entered judgment for the respondents. The learned High Court judge granted

judgment in favour of the respondents as follows:

(a) general damages of RM50,000 to the first plaintiff and RM150,000 to the second plaintiff;

(b) aggravated damages of RM20,000 to the first plaintiff and RM30,000 to the second plaintiff; and

(c) exemplary damages of RM20,000 to the first plaintiff and RM30,000 to the second plaintiff.

ISSUES

[17] As we said earlier, the main issue seriously argued before us is whether the appellant is entitled to rely on the defence of absolute privilege. If the answer is in the affirmative, the second issue would be whether the learned High Court judge committed an error of law by ruling that the defence cannot be availed because of the irrelevancy of the defamatory pleadings, lack of good faith and malice. Nonetheless, we shall make brief reference to the other issues first.

Justification and fair comment

[18] The first respondent testified that she was not married to the second defendant. The second respondent, on the other hand said that he is a married man. The only fact conceded by the respondents was that they were in the hotel room at the material time. The respondents categorically denied committing adultery in their evidence. The evidence of the respondents denying that they committed adultery was not seriously challenged during cross-examination by counsel for the appellant. No witnesses were called on behalf of the appellant either. The second defendant allowed judgment to be entered by default. He did not give evidence. The burden to prove the defence of justification was on the appellant. In the premises, we see no error in the finding of the learned High Court judge that the defence of justification failed. Similarly, the defence of fair comment, although not dealt with by the High Court, cannot stand as the foundational fact of adultery was not proved. Therefore, no fair comment can be validly made upon it.

Defence of absolute privilege

[19] We do not propose to cite all the major local cases that discussed the defence of absolute privilege. We find that the law is fairly settled on this issue. We are more concerned with the application of the law to the facts of this case; particularly the correctness of the decision of the learned High Court judge placed who placed a restriction on the defence of absolute privilege.

[20] However, for the sake of directing ourselves on the law, we shall first quote below some passages from three eminent English authorities on the defence of absolute privilege that is granted to defamatory statements that are made in the course of court proceedings.

[21] In the early ground-breaking case of *Royal Aquarium*, the principle of absolute privilege was laid widely and in absolute terms by Lopes LJ in the following passage:

> The authorities establish beyond all question this: that neither party, witness, counsel, jury, nor judge, can be put to answer civilly or criminally for words spoken in office; that no action of libel or slander lies, whether against judges, counsel, witnesses, or parties, for words written or spoken in the course of any proceeding before any Court recognised by law, and this though the words written or spoken were written or spoken maliciously, without any justification or excuse, and from personal ill-will and anger against the person defamed.

[22] In *Lincolns v Daniels*, Devlin LJ unambiguously and without qualification said that the defence of absolute privilege extends to all pleadings for the purpose of court proceedings. The relevant passage which is quoted often in our courts is as follows:

> The absolute privilege which covers proceedings in or before a court of justice can be divided into three categories. The first category covers all matters that are done coram judice. This extends to everything that is said in the course of proceedings by judges, parties, counsel and witnesses, and includes the contents of documents put in as evidence.
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> The second covers everything that is done from the inception of the proceedings onwards *and extends to all pleadings and other documents brought into existence for the purpose of the proceedings and starting with the writ or other document which institutes the proceedings.*
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> The third category is the most difficult of the three to define. It is based on the authority of *Watson v McEwan*, in which the House of Lords held that the privilege attaching to evidence which a witness gave coram judice extended to the precognition or proof of that evidence taken by a solicitor. (Emphasis added.)

[23] The position in English law is also captured succinctly in *Gatley on Libel and Slander* (11th Ed), at p 382 as follows:

> No action will lie for defamatory statements, whether oral or written, made in the course of judicial proceedings before a court of justice or a tribunal exercising functions equivalent to those of an established court of justice. (gratefully extracted from the judgment of S Nantha Balan J in *Chan Tse Yuen & Co (suing as a firm) v Yap Chin Gaik, Elaine and others* [2017] MLJU 1459; [2017] 1 LNS 1409.

[24] The rationale for the absolute privilege was expressed in the well-known

case of *Munster v Lamb* by the English Court of Appeal in the following passage:

> If the rule of law is otherwise, the most innocent of counsel might be unrighteously harassed with suits, and therefore it is better to make it a rule of law so large that an innocent counsel shall never be troubled, although by making it so large counsel are included, who have been guilty of malice and misconduct.

[25] The above-mentioned passage was quoted by Haidar JCA in *Mahadevi Nadchatiram v Thiruchelvasegaram Manickavasegar*. His Lordship also noted that Mathew J at the court of first instance in *Munster v Lamb*, placed a restriction on the immunity by saying as follows:

> Words spoken by an advocate in the course of the defence of his client, however, defamatory they may be of the prosecutor, are not actionable, provided *they are relevant to the matter at hand, and spoken in good faith.* (Emphasis added.)

[26] Haidar JCA endorsed the above-mentioned passage in his judgment and said as follows:

> No doubt, such view was not adopted by the Court of Appeal in *Muster v Lamb* but with respect, we are of the view that if there is no restriction that would amount to giving a counsel or a party a carte blanche to make a defamatory statement of a person or party who has absolutely no connection with the proceedings before the court. Surely this cannot be the position and with respect, we disagree with the learned judge on 'his view there must be no restriction placed in the way of the principle'.

[27] The above observation of Haidar JCA was cited by the learned High Court judge in the instant case to place restriction on the defence of absolute privilege that was pleaded by the appellant. His Lordship said that the appellant cannot claim absolute privilege because the defamatory averments in the statement of defence were not relevant and were not made in good faith.

[28] In our opinion, the learned High Court judge seriously misdirected himself by relying on the above-mentioned passage in the judgment Haidar JCA to deprive the appellant of the defence of absolute privilege. Our reasons are as follows.

[29] In *Mahadevi Nadchatiram v Thiruchelvasegaram Manickavasegar*, the plaintiff pleaded nine instances of defamation. The passage in question is in relation to the first and second defamation which were made in the submissions to the court in another suit. Nonetheless, Haidar JCA found that the defamatory statements were protected by absolute privilege because they were made in submissions filed in the course of court proceedings. His Lordship did not restrict the defence of absolute privilege. The decision in respect of the first

and second defamation is as follows:

> In the circumstances we agree with the learned judge's finding that *however defamatory the contents of those written submissions* (*some of which tend to go overboard)* of the respondent may be, they are protected by absolute privilege. In view of our finding affirming the decision of the learned judge, the cross-appeal by the respondent fails. (Emphasis added.)

[30] The passage relied on by the learned High Court judge to restrict the defence of absolute privilege is not applicable for two other reasons as well. The first reason is that Haidar JCA was referring to a hypothetical situation in which a defamatory statement is made against someone 'who has absolutely no connection' with the court proceedings in question. In the instant case, the parties against whom the defamatory statements were made are obviously parties who have connection with the negligence suit. This point was missed by the learned High Court judge. Thus, the passage relied on by the learned High Court judge is not applicable to the facts of the instant case.

[31] The second reason is that the defamation in this case was published in the statement of defence. The principle that pleadings and documents filed in court proceedings are protected by absolute privilege as stated in the trio of English cases that we cited above has been consistently accepted and applied by our courts. For example, see the cases of *S Ashok Kandiah & Anor v Dato' Yalumallai @ Ramalingam s/o Muthusamy & Anor* [2010] MLJU 2218; [2011] 1 CLJ 460, *Mahadevi Nadchatiram v Thiruchelvasegaram Manickavasegar* and *Chan Tse Yuen & Co (suing as a firm) v Yap Chin Gaik, Elaine and others*. In the premises, once it is accepted that absolute privilege applies to an averment in a pleading, there can be no question of limiting the defence by placing restriction on it such as the requirement of relevance and good faith. Otherwise, only the defence qualified privilege will apply to defamatory statements made in the course of court proceedings.

[32] As we said earlier, the second authority relied on by the learned High Court judge to place restrictions on the defence of absolute privilege is the dissenting judgment of Hamid Sultan JCA in *Kalung Makmur Sdn Bhd v Lo Yen Nyuk*. In that case, Hamid Sultan JCA cited the following passage from *Westcott v Westcott* [2008] EWCA Civ 818 which is the English authority on granting absolute privilege in respect of a defamatory police report:

> [32] The authorities recited above have made it clear that the justification for absolute immunity from suit will depend upon the necessity for the due administration of criminal justice that complaints of alleged criminal conduct should always be capable of being made to the police free from fear that the person accused will subsequently involve the complainant in costly litigation. There is a countervailing public interest in play which is that no-one should have his or her reputation traduced, certainly not without affording him or her a remedy to redress

the wrong. *A balance has to be struck between these competing demands: is it necessary to clothe the occasion with absolute privilege in which event even the malicious complainant will escape being held to account, or is it enough to allow only the genuine complainant a defence? Put it another way: is it necessary to protect from vexatious litigation those persons making complaint of criminal activity even at the cost of sometimes granting that impunity to malicious and untruthful informants? It is not an easy balance to strike. We must be slow to extend the ambit of immunity.* (Emphasis added.)

[33] After citing the above mentioned passage, the learned High Court judge imposed the requirement that the impugned pleadings must be relevant and made in good faith before absolute privilege can be availed. We find that the learned High Court judge again misdirected himself by doing so. The above mentioned case was in relation to a police report and not a defamatory pleading in court proceedings. Secondly, the majority of the Court of Appeal correctly held that by virtue of the Federal Court decision in *Lee Yoke Yam v Chin Keat Seng* [2013] 1 MLJ 145; [2012] 9 CLJ 833, police reports are covered by absolute privilege.

CONCLUSION

[34] In concluding this judgment we have this to say. The defamation in the instant case was published within the four corners of a court proceeding. Although the impugned averments were irrelevant, reckless and perhaps malicious, by virtue of the eminent authorities that we cited, defence of absolute privilege can be availed by the appellant. The learned High Court judge erred in deciding otherwise. In the premises, we shall allow this appeal and set aside the decision of the High Court. Given the circumstances in which the defamation action arose, we make no order as to costs.

Appeal allowed and High Court's decision set aside.

Reported by Ashok Kumar